No. 22,031

IN THE

United States Court of Appeals

For the Ninth Circuit

RONALD ANDERSON, doing business as Channel Marine,

Appellant,

vs.

THE INTERNATIONAL ONE DESIGN SLOOP "FLIRT", her rigging, tackle and apparel, and ERNEST P. BROWN, her owner,

Appellees.

Appeal from the United States District Court for the Northern District of California

APPELLANT'S OPENING BRIEF

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JURISDICTION

"The District Court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction . . ." 28 USCA, §1333.

The present claim on this appeal arises out of a maritime contract for repairs[1] and as a consequence the

[1]Appellant's complaint alleges that plaintiff is engaged in the business of marine painting and repair, that defendant Brown is the owner and operator of the International One Design Sloop

admiralty court has jurisdiction. *Archawaski v. Hanioti,* 350 U.S. 532 at 535, 76 S.Ct. 617 at 620 (1956); *North Pacific S.S. Co. v. Marine Ry. & Shipbuilding Co.,* 249 U.S. 119, 39 S.Ct. 221 (1919); *Barker v. U.S. Dist. Court in and for Southern Dist. of Cal., Central Division,* 185 F.2d 585 (9th Cir. 1951).

STATEMENT OF THE CASE

(a) Question involved:

Whether the record discloses a valid accord and satisfaction of Anderson's disputed claim against Brown.

(b) Manner in which question raised:

Appellant (hereafter "Anderson") billed respondent (hereafter "Brown") $848.21 for work, labor and materials expended in refinishing the hull of defendant's racing yacht, the International One Design Sloop "FLIRT."[2] Brown objected to the bill claiming that Anderson had contracted to perform the refinishing for the sum of $500.00, and that that amount was all that was due and owing to Anderson.[3] Anderson and Brown were unable to settle the dispute as to whether Brown owed Anderson the additional $348.21.[4] Brown

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"Flirt" and that said yacht is now lying afloat within San Francisco Bay and within the jurisdiction of the Admiralty Court and that appellant furnished at the instance and request of defendant Brown certain repairs to said yacht. TR, Vol. 1, p. 1, lines 26-32, p. 2, lines 1-7, Paragraphs I-IV of plaintiff's complaint.

[2]Affidavit of Plaintiff Anderson in Opposition to Defendant's Motion for Summary Judgment, TR, Vol. 1, p. 32, lines 22-32.

[3]Answer to Complaint, TR, Vol. 1, p. 7, lines 7-11.

[4]Anderson's Complaint, Paragraph 4, TR, p. 2, lines 15-17.

then forwarded a check for $500.00 marked "Paid in full—endorsement constitutes payment in full." Anderson struck the added language and accepted the check as payment of the $500.00[5] which Brown admitted to be due and owing.[6] Brown refused to pay the remaining $348.21[7] and Anderson filed his complaint in admiralty in personam against Brown and in rem against Brown's yacht.[8] Brown answered admitting that the $500.00 was due and owing[9] alleging that an agreement existed between Brown and Anderson whereby Anderson had undertaken to perform the repairs to Brown's yacht for the sum of $500.00[10] and claiming as a separate answer and defense that Anderson's acceptance of the check constituted an accord and satisfaction.[11] Brown thereafter brought motion for summary judgment[12] which was granted by the court below on the ground that no genuine issue of material fact was present in the case.[13] In reaching this conclusion, the court necessarily rejected Anderson's argument that acceptance of the check did not constitute an accord and satisfaction in that the $500.00 paid by defendant was admittedly due and owing and accordingly there was no consideration for

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[5]Brown's Answer, TR, p. 8, lines 6-19.

[6]"Answering Paragraph V of said Complaint, this defendant admits and alleges to owing only the sum of $500.00, which sum has already been paid." Brown's Answer, Paragraph III, TR, p. 7, lines 14-16.

[7]Complaint, Paragraph VI, TR, p. 2, lines 15-17.

[8]Complaint, TR, pp. 1-2.

[9]See fn. 6, *supra.*

[10]See fn. 5, *supra.*

[11]Answer, TR, Vol. 1, p. 7, line 29 to p. 8, line 21.

[12]TR, Vol. 1, pp. 13-14.

[13]TR, Vol. 1, p. 35.

a compromise. Obviously, if the court had accepted this argument, there would be genuine issues of material fact including

(a) Whether or not Anderson and Brown contracted to repair the vessel for the sum of $500.00, and

(b) Whether or not the work performed by Anderson justified a bill of $848.21.

These issues are clearly raised by Anderson's Complaint[14] and Brown's Answer thereto.[15]

SPECIFICATION OF ERRORS RELIED UPON BY APPELLANT

1. The lower court erred in granting defendant's motion for summary judgment and directing dismissal of the action in that there was and is a genuine issue of material fact and defendants were not entitled to judgment as a matter of law.

2. The District Court erred in necessarily finding as a basis for its judgment that an accord and satisfaction existed where the payment made was an amount admittedly due and owing and there was no consideration for the accord and satisfaction.[16]

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[14]TR, Vol. 1, pp. 1-5.

[15]TR, Vol. 1, pp. 6-9.

[16]If no accord and satisfaction exists there are at least two genuine issues of material fact:

(1) Appellant disputes respondent's contention that appellant agreed to perform the repairs for the sum of $500.00, and

(2) If no such agreement existed, appellant contends and respondent disputes that the sum of $848.21 was the value of the repairs.

ARGUMENT OF THE CASE

(A) SUMMARY

A clear statement of the points of law and facts to be discussed has already been set forth by appellant's Statement of the Case, *supra*. Appellant's basic contention is that an accord and satisfaction, like any other agreement, must be supported by consideration. Since Brown paid an amount ($500.00) which was not disputed and was admittedly due and owing, there was no consideration for and there could have been no accord and satisfaction of the disputed sum of $348.21.

(B) POINTS AND AUTHORITIES

Defendant argues that the general rule in California is that acceptance of a check marked "paid in full" constitutes a binding settlement of the entire debt.[17] Defendant overlooks the well recognized exception to the general rule to the effect that an accord and satisfaction, like any other valid contract, requires a consideration. *MacIsaac & Menke Co. v. Cardox Corp.* (1961), 193 Cal.App.2d 661, 14 Cal.Rptr. 523. In that case the defendant contractor had orally agreed with the plaintiff subcontractor to pay the reasonable cost of the additional work made necessary by the defendant's failure to provide plans and equipment in conformance with the original contract. The trial court found the reasonable value of this additional work to be $15,623.79. On appeal from an adverse judgment,

[17]TR, Vol. 2, p. 3, lines 7-13.

the defendant urged that its liability, if any, for such work was limited to the sum of $8,991.11 by reason of a writing signed by plaintiff which acknowledged receipt of a final progress payment as payment in full of all sums due plaintiff other than the sum of $8,991.11, as to which there was a dispute. The Appellate Court rejected the contention, stating at pages 670-671:

> "There are numerous reasons why defendants' claim must fail, but we will dislodge it of any merit by merely pointing out that the receipt, the alleged accord agreement, is not supported by any consideration in that the payment of $6,139.25 [the final progress payment] was admittedly due and owing; therefore, the alleged accord and satisfaction agreement must fail for lack of consideration. (See also: *Moore v. Bartholomae Corp.,* 69 Cal.App.2d 474 [159 P.2d 436]; *D. E. Sanford Co. v. Cory Glass etc. Co.,* 85 Cal.App.2d 724 [194 P.2d 127]; *Egan v. Crowther,* 74 Cal.App. 674 [241 P. 900].)"

A similar result was reached in *Western Concrete Structures Co. v. James I. Barnes Constr. Co.,* 206 C.A.2d 1 (1962). In that case defendant had made a progress payment of $28,636.20 which was admittedly due and owing. Typed across the face of the check was the notation "Acceptance of this check acknowledges payment in full of all moneys due to date . . ." Defendant argued that acceptance of this check by the plaintiff constituted an accord and satisfaction. The court rejected this contention noting (as in the *MacIsaac* case) that the amount paid was *admittedly* due

and owing and accordingly there was no consideration for the alleged accord and satisfaction.

The facts in the present instance fall squarely within the exception to the general rule set forth in *MacIsaac* and *Western Concrete Structures* that settlement by payment must be supported by consideration.

Brown attempts to distinguish the *Western Concrete Structures* case on the ground that it involved two separate invoices while the present dispute involves only one.[18] This is a formalistic distinction which should have no relevance to the proceeding. In both cases the amount paid was admittedly due, owing and undisputed.[19] The record is clear that Brown and Anderson both considered the $848.21 in two parts. On the one hand was the $500.00 which was never in dispute, which Brown admitted was due and owing and which Brown alleged was the agreed contract price.[20] On the other hand was the $348.21 additional amount. This was the only amount over which the parties disagreed.[21] Since Brown, by paying the $500.00 admittedly due and owing, made absolutely no payment as to the additional disputed sum, there could have been no consideration for an accord and satisfaction of that sum.

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[18]TR, Vol. 2, p. 3, lines 14-18.

[19]TR, Vol. 1, p. 6, lines 14-16: "this defendant (Brown) admits and alleges to owing only the sum of $500.00 which sum has already been paid."

[20]Brown's Answer, TR, Vol. 1, p. 6, line 31 to p. 7, line 21; Anderson's Affidavit, TR, Vol. 1, p. 33, lines 1-4.

[21]Fn. 20, *supra*.

CONCLUSION

The basic question before the lower court was whether the parties had reached an accord and satisfaction of the disputed amount ($348.21). The lower court found that they had, ignoring the clear evidence to the contrary and a well-established exception to a rule of California law. It followed from the court's conclusion, that no genuine issue of material fact remained and as a consequence the court granted Brown's motion for summary judgment. The court clearly erred in doing so. Anderson's appeal should be granted and the matter returned to the lower court for trial of the existing genuine issues of material fact.

Dated, San Francisco, California,
December 8, 1967.

Respectfully submitted,
WILLIAM H. KING,
Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM H. KING,
Attorney for Appellant.